Andrew H. Wilson, SBN #063209
WILSON, RYAN & CAMPILONGO
235 Montgomery Street
Suite 450
San Francisco, California 94104
(415) 391-3900
Telefax: (415) 954-0938

Michael Lee Hertzberg
740 Broadway, 5th Floor
New York, New York 10003
(212) 982-9870

Laurie J. Bartilson, SBN #139220
MOXON & BARTILSON
6255 Sunset Boulevard, Suite 2000
Hollywood, CA 90028
(213) 960-1936
Telefax: (213) 953-3351

Attorneys for Plaintiff
CHURCH OF SCIENTOLOGY
INTERNATIONAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

CHURCH OF SCIENTOLOGY INTERNATIONAL, a California not-for-profit religious corporation, Plaintiff, vs. GERALD ARMSTRONG; DOES 1 through 25, inclusive, Defendants.	CASE NO. 157 680 [CONSOLIDATED] PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION OF THE FOURTH, SIXTH AND ELEVENTH CAUSES OF ACTION OF PLAINTIFF'S SECOND AMENDED COMPLAINT DATE: January 27, 1995 TIME: 9:00 a.m. DEPT: 1 TRIAL DATE: May 18, 1995

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Armstrong concedes that he has breached the settlement agreement in precisely the manner described in plaintiff's moving papers, and that plaintiff has fully performed its side of the bargain, paying him $800,000. Armstrong attempts to avoid liability by resorting to theories of affirmative defense that have already been rejected by the courts in this action, and/or are not supported by California law. However, the evidence and the law is very clear: Armstrong and the Church entered into an agreement in 1986. The Church performed its part of the agreement, and Armstrong breached the agreement. Armstrong must pay the Church liquidated damages for his breaches.

Of the 43 affirmative defenses raised in his Answer, Armstrong has abandoned 40, and now raises only three: privilege, penalty, and duress. None can avail him now. The California courts have held that the "litigant's privilege" is not absolute: it can be waived by contractual agreement, and Armstrong has so waived it. Further, current law presumes the validity of a liquidated damages clause, and places the burden on the defendant to raise specific facts which demonstrate "that the provision was unreasonable under the circumstances existing at the time the contract was made." Armstrong has not done this. Instead, he has cited to old case law which attempted to interpret an earlier statute, and is irrelevant to the issues which must be decided today. His argument concerning duress, repeated yet again with only his own contradictory declaration for support, has already been rejected by two courts and must be rejected by this Court as well.

In short, Armstrong is grasping at straws. This court can, and should, interpret the terms of the contract as a matter of law. Armstrong has admitted making the contract; he has admitted each and every breach; and every court that has considered the contract thus far has agreed that it is valid and must be upheld. Summary adjudication is mandated.

II. ARMSTRONG HAS NOT DEMONSTRATED THE EXISTENCE OF A TRIABLE ISSUE OF MATERIAL FACT

By legislation adopted in 1992 and 1993, the Legislature changed the burdens of proof which the parties to a summary judgment motion must bear. Section 437c(o)(1) of the Code of

Civil Procedure now provides, in part, that

> A plaintiff. . . has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff. . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.

(emphasis supplied).

Moreover, to overcome a summary judgment, a defendant may not rely on mere allegations or denials in his pleadings:

> [O]nce the plaintiff has met that burden, the burden shifts and, to defeat the motion, the opposing defendant must produce sufficient admissible evidence to raise a triable issue of material fact either as to the cause of action or as to an affirmative defense.

American States Insurance Company v. Superior Court (1994) __ Cal.App.4th ___, 33 Cal.Rptr.2d 616, 619 (Insured could not overcome insurers showing that it was not required to defend by their own "vague, ambiguous and speculative statements").

Further, it is not sufficient merely for a defendant to demonstrate that a factual dispute of some sort exists: if no conflict exists as to any element of plaintiff's claim or as to an affirmative defense, "no amount of factual conflict upon other aspects of the case will preclude summary judgment." Shively v. Dye Creek Cattle Company (1994) __ Cal.App. 4th ___, 35 Cal.Rptr. 238, 241.

In response to plaintiff's summary adjudication motion, Armstrong has admitted that the following facts, which establish the essential elements of plaintiff's claims, are not in dispute:

- That plaintiff and Armstrong entered into a settlement agreement ("the Agreement") in December, 1986 [Sep.St. No. 1 - 4];
- That Armstrong was represented by, and consulted, more than one attorney concerning the provisions of the Agreement prior to executing it [Sep.St.No. 5 (Armstrong disputes only the quality of the representation and advice that he received)];
- That Armstrong assured plaintiff and plaintiff's lawyers, on videotape, while signing the Agreement, that he had read and understood the entirety of the Agreement, and that he was signing it freely, and without duress or coercion [Sep.St.No. 6];
- That Armstrong received approximately $800,000 as his portion of the total settlement

sum paid by plaintiff [Sep.St.Nos. 7, 8];

- That one of the provisions of the Agreement provided that Armstrong agreed to "maintain strict confidentiality and silence with respect to his experiences with the Church of Scientology and any knowledge or information he may have concerning the Church of Scientology [or] L. Ron Hubbard. . . .," and that if Armstrong breached the terms of this provision, "CSI . . . would be entitled to liquidated damages in the amount of $50,000 for each such breach." [SepSt.No. 9];

- That in 1991 and 1992, Armstrong provided declarations to anti-Scientology litigants which discuss Scientology, and which were filed in two cases [Sep.St.No. 15, 18, 23, 24];[1] and

- That in 1992, Armstrong provided interviews to reporters from the Cable News Network and The American Lawyer magazine [Sep.St.No. 19, 20].[2]

---

[1] Armstrong disputes whether or not the content of the Aznaran declaration exposes him to liability [Sep.St.No. 18]. This is not a factual dispute, however, as both parties agree as to the contents of the declaration [Plaintiff's Exhibit 1A, Exhibit 11.]. The court need only interpret the unambiguous contents of the declaration to determine whether or not the declaration is a breach of the contract. The declaration states, in relevant part, "I was a Scientologist from 1969 to 1981 and held many organizational positions during that period. . . ." [Ex. 11 to Ex. 1A, ¶1]; "Throughout 1980 and 1981 I was L. Ron Hubbard's biographical researcher and archivist. During that period I read and studied his letter dated September 7, 1955 to the Federal Bureau of Investigation and I provided a copy of it to writer, Omar V. Garrison for his use in a biography of Hubbard. . . ." [Id., ¶2]; and "While I was a Scientologist I read and studied L. Ron Hubbard's Technical Bulletin of July 22, 1956. It was published in the 1970's in bound volumes of Hubbard's "technical" writings and has continued to be published in later volumes up to the present time. . . ." [Id., ¶3] Armstrong's argument that these statements do not breach his agreement to "maintain strict confidentiality and silence with respect to his experiences with the Church of Scientology and any knowledge or information he may have concerning the Church of Scientology [or] L. Ron Hubbard" is frivolous on its face. Further, paragraph 7(D) also prohibits Armstrong from disclosing the contents of documents which concern or relate to the Church or L. Ron Hubbard. The declaration breaches this clause also.

[2] Similarly, Armstrong does not dispute that he granted interviews or made statements, but claims that the statement, "I'm an expert in the misrepresentations Hubbard made about himself from the beginning of Dianetics until the day he died," which Armstrong made to CNN reporter Don Napp for national broadcast, is not covered by the Agreement. This is so, according to Armstrong, because he supposedly acquired some of his "expertise" after the execution of the Agreement. By the clear terms of the Agreement, the date on which Armstrong gained his knowledge is irrelevant: he agreed to "maintain strict confidentiality and silence" on the subjects of Scientology and L. Ron Hubbard. As to the Horne interview, Armstrong admitted in deposition that he discussed settlement agreements between the Church and others, in

(continued...)

Armstrong has not provided any evidence of facts which contradict these essential elements. Instead, the evidence which Armstrong has provided consists of two volumes of ad hominem attacks on plaintiff, their counsel and his own former counsel; a mass of irrelevant papers filed in other cases; and a series of vague, speculative conclusions on Armstrong's own part that he should be excused from performance. None of this "evidence" creates any issue of fact that is material to determination of these three causes of action. As demonstrated below, none of it supplies any issue of material fact as to Armstrong's three asserted affirmative defenses, either.

III. ARMSTRONG'S AFFIRMATIVE DEFENSES DO NOT RELEASE HIM FROM LIABILITY UNDER THE CONTRACT.

Armstrong has resisted liability pursuant to the Agreement for three years, claiming that the contract was void because it violated public policy, violated his first amendment rights, violated due process, was conceived under duress, was an illegal agreement, etc. etc. -- all of the defenses listed in his affirmative defenses, and every creative twist that he and his lawyers could add to those. By the time the issue went to the Court of Appeal, Armstrong devoted 10 pages of his appellate briefing to telling the Court just how many reasons he had to justify taking $800,000 from plaintiff and welshing on his end of the deal. The Court of Appeal's response was to uphold the plaintiff's preliminary injunction and to "decline any extended discussion" of Armstrong's "shotgun-style" arguments. [Sep.St.No. 13.] Here, Armstrong has abandoned forty of those defenses, and relies on only three: the litigant's privilege, penalty and duress. As a matter of law, however, he has failed to meet his burden of demonstrating how any of these defenses can invalidate his contractual obligations.

A. Armstrong May Not Raise The Litigant's Privilege As A Defense To An Action For Breach Of A Non-Disclosure Contract

Armstrong devotes more than six pages of his opposing brief to providing this Court with a history of the common-law principals which have prevented the federal courts from entertaining 42 U.S.C §1983 civil rights actions against witnesses and prosecutors [Opp.Mem. at 7-11].

---

[2](...continued)
addition to his own settlement agreement, with Horne [Armstrong's Exhibit 1(D) 352:15 - 353:9]. Again, this is knowledge concerning the Church.

However, he has neglected to provide the Court with the single California case which is dispositive of the issue which he raises: ITT Telecom Products Corp. v. Dooley (1989) 214 Cal.App.3d 307, 262 Cal.Rptr. 773.

In ITT Telecom, the defendant, Dooley, was a former employee of ITT who signed a non-disclosure agreement during his employment. After leaving ITT, he accepted employment as an expert "consultant" to Intercomosa, a company in litigation with ITT. ITT sued Dooley for, inter alia, breach of contract, alleging that, while acting as Intercomosa's consultant, he had disclosed "confidential knowledge" about ITT in violation of his non-disclosure agreement. Dooley, like Armstrong, argued that he was protected from the breach of contract claim by the litigant's privilege (Civil Code § 47(b)). The issue, as framed by the Court was, "Does the [Section 47(b)] privilege apply to statements violating a contract of confidentiality?" 214 Cal.App.3d at 317. After noting that "it is possible to waive even First Amendment free speech rights by contract," Id. at 319, the Court of Appeal concluded that Dooley "was not privileged under Civil Code section 47, subdivision 2, to voluntarily breach an express confidentiality agreement." Id. at 320.[3]

This case is dispositive of the issue raised by Armstrong. Armstrong, like Dooley, entered into a contract in 1986 in which he agreed "to maintain strict confidentiality and silence" concerning plaintiff and the other beneficiaries of the Agreement. He has admitted that in 1991 and 1992, he executed declarations for anti-Church litigants in two cases, and provided those declarations to the attorneys for the litigants. On their face the declarations violate the Agreement. [See Note 1, supra] The litigant's privilege is no more available to Armstrong than it was to Dooley, and for the same reason: these parties contractually waived their right to claim the privilege.

Since it was decided in 1989, the ITT case has been cited with approval by the California

---

[3] Unfortunately, the omission of this case by Armstrong and his counsel cannot be charitably termed to be accidental. The case was cited by plaintiff in their brief to the Court of Appeal in this action, and then cited with favor by that Court in its opinion [Plaintiff's Exhibit C to Request for Judicial Notice at 9.] It was also cited by plaintiff in their opening memorandum of points and authorities herein. [Mem. at 12, fn 6] Knowing failure to cite this controlling law is sanctionable conduct.

Supreme Court and by other Courts of Appeal (as it was by the Second District in this case). Silberg v. Anderson (1990) 50 Cal.3d 205, 217, 266 Cal.Rptr. 638, 645; Mattco Forge, Inc. v. Arthur Young & Co. (1992) 5 Cal.App.4th 392, 406, 6 Cal.Rptr.2d 781, 790; Budwin v. American Psychological Association (1994) 24 Cal.App.4th 875, 881, 29 Cal.Rptr.2d 453, 457. The limitations that these courts have placed on the litigation privilege make it plain that the privilege is not available to Armstrong in the face of his explicit contractual obligation to "maintain strict confidentiality and silence." As the Second District stated in Mattco, supra,

> Sometimes the litigation privilege is called "absolute." This characterization overstates the mater. The privilege applies only to tort causes of action, and not to the tort of malicious prosecution. The privilege does not protect, moreover, a claim for damages under the Invasion of Privacy Act, a psychotherapist's voluntary disclosure during a custody proceeding of a patient's confidential communications, or, as we have seen, statements made in a judicial proceeding that violate a contractual provision not to disclose a former employer's trade secrets.

5 Cal.App.4th at 406 (citations omitted).

Thus, under controlling California law, the litigant's privilege is not a defense to plaintiff's breach of contract claims against Armstrong as a matter of law.

B. The Liquidated Damages Clause Is Presumed To Be Valid And Armstrong Has Not Raised Any Triable Issue Of Fact Concerning Its Validity

Armstrong argues that the liquidated damages provision should be invalidated because he made no effort to ascertain what a fair amount of liquidated damages would be prior to signing the contract, citing a 1976 case to the effect that both parties must participate in such an effort before a liquidated damages provision will be upheld. Armstrong is relying on case law which has been superseded. In 1977, Section 1671 of the Civil Code, which governs liquidated damages provisions, was revised. Where the earlier statute had placed the burden on proponents of liquidated damages provisions to defend their enforceability, the current statute instead presumes their validity. Current Civil Code §1671(b) provides in relevant part that, ". . . a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."[4]

[4] The exceptions to this rule, noted in subdivision (c), are consumer contracts for purchase, (continued...)

Here, Armstrong has not demonstrated that the provision was unreasonable under the circumstances existing at the time the contract was made. He has asserted, contradicting himself, both that he did not discuss the liquidated damages amount with anyone, and that he discussed it with both of his attorneys. [See, Armstrong Dec. at ¶12 and ¶¶5 & 13.] He claims that he "never agreed" to the provision, but has admitted the validity of a videotape, made at the time of the settlement, in which he assured plaintiff and plaintiff's lawyer that he had, indeed, read and agreed to the entire Agreement. He can then be observed signing the Agreement and initialing every page; he has authenticated his signature and his initials on the pages on which the liquidated damages provision appears.

Armstrong's current statements which contradict his admissions are insufficient to create an issue of fact as to the circumstances which existed at the time the Agreement was made. In the words of the First District, "In reviewing motions for summary judgment, the courts have long tended to treat affidavits repudiating previous testimony as irrelevant, inadmissible or evasive." Advanced Micro Devices, Inc. v. Great American Surplus Lines Ins. Co. (1988) 199 Cal.App.3d 791, 800-801, 245 Cal.Rptr. 44. This is because

> [A]dmissions against interest have a very high credibility value. . . Accordingly, when such an admission becomes relevant to the determination, in motion for summary judgment, of whether or not there exist triable issues of fact (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits.

D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 21, 112 Cal.Rptr. 786.

The only other evidence which Armstrong offers does not support his theory that the amount of the liquidated damages was not reasonable at the time the Agreement. Lynn Farny's testimony, for example, simply reiterates the necessity which the Church felt at the time of the settlement to use every means possible to secure Armstrong's performance of the contract. Mr. Farny testified that the amount of the liquidated damages was based on an estimate of the costs that plaintiff would be likely to incur if it had to "fix" one of Mr. Armstrong's breaches. [Ex. __ to Opp., 494:18 - 498:8.] He also explained that it was extremely difficult to know in

---

[4](...continued)
rental or lease -- obviously not applicable to the present Agreement.

advance just what the damage would be from any given statement by Armstrong, rendering a liquidated damages provision necessary. [Id., 506:3 - 507:17.]

The releases signed by Vicki and Richard Aznaran in 1987, in which the liquidated damages provision called for $10,000 per breach in liquidated damages, do not demonstrate that the amount contained in the Agreement was excessive. On the contrary, if anything, the Aznaran declarations demonstrate the care with which the Church proposed a $50,000 liquidated damages provision for Armstrong. The Aznarans signed releases with the Church upon leaving: they were not suing the Church at the time, they had not been interviewed by the media, and they had not provided any aid to anti-Church litigants [Declaration of Ken Long in support of Motion for Summary Adjudication]. At the time the Church settled with Armstrong, however, Armstrong was not simply an anti-Church litigant: he was a professional witness against the Church in other litigation, a paralegal who worked extensively on anti-Church cases, and a self-designated PR who liked nothing better than to be interviewed by the sensational press. Prior to the Agreement, Armstrong had testified in 15 cases, including his own, for a total of 28 trial days. [Id., ¶¶5-6.] He had been deposed for 19 days. [Id.] He had filed 28 declarations in 15 cases [Id, ¶6], and he had appeared on more than 10 television and radio programs, including a lengthy interview in October, 1986 on 2020. [Id., ¶7.] He had been featured around the United States in more than 76 news stories. [Id., ¶8.] All of his testimony, all of his media appearances were attacks on the Church or other individuals and entities protected by the Agreement [Id., ¶¶4-8]. Under these circumstances, the Church had every right and reason to insist that further breaches by Armstrong were likely to result in significant damages, including damage to its reputation and litigation against it by other parties, and to insist on a substantial amount of liquidated damages in the event of a breach.

In 1991, the First District Court of Appeal undertook an historical analysis, and determined that the validity of a liquidated damages clause is an issue to be determined by the Court, and not the jury. Beasley v. Wells Fargo Bank (1991) 235 Cal.App.3d 1383, 1393, 1 Cal.Rptr.2d 446, 450. Based on the evidence presented by plaintiff, and Armstrong's failure to present any credible contradictory evidence, this Court should find the liquidated damages provision to be

valid and enforceable as a matter of law.

C. Armstrong Cannot Avoid Summary Adjudication With Tired Claims Of Duress

As a final argument, Armstrong urges this Court to refuse to enforce the Agreement because he claims that he was subjected to coercion by his own lawyer, Michael Flynn, and another settling party, in 1986. Armstrong urged this same defense to Judge Sohigian, who found in 1992 that Armstrong had not persuasively shown any duress. He repeated his arguments to the Court of Appeal, who reiterated in 1994 that the record did not support his claims. Armstrong offers no new evidence to this Court. Rather, he merely repeats in his own declaration a recitation of the bad advice which he allegedly got from Flynn that convinced him to sign the Agreement. After years of litigation, he offers no evidence from any corroborating witness as to any of his claims.

Even if Armstrong's allegations are assumed to be true,[5] however, they still do not assert a defense of duress as to plaintiff. Armstrong does not offer evidence that the Church subjected him to duress or coercion. He claims that his lawyer and other litigants convince him to sign the Agreement. Armstrong cites no authority, and there is none, holding that a party may set aside a settlement agreement because his attorney strongly urged him to settle for nearly one million dollars.

Indeed, the fact that Armstrong accepted, retained and continues to retain the benefit of his bargain precludes him from seeking to set aside the Agreement. Under California law, even where an agreement is the product of duress, coercion, undue influence or fraud, it is voidable, not void. Civil Code §§ 1566, 1567. This distinction means that the allegedly wronged party, in this case Armstrong, must act in a timely and affirmative manner to rescind the voidable contract. The allegedly wronged party can also ratify a voidable contract by his or her subsequent conduct, as Armstrong has done in this case. Civil Code § 1588. Armstrong's continued acceptance and enjoyment of the benefits of the transaction, well beyond the time he

---

[5] Armstrong's argument that he did not have independent advice of counsel is also contradicted by his own deposition testimony that he consulted not one but three attorneys concerning the settlement agreement. [Sep.St.No. 5.]

signed the agreement, as a matter of law constitutes consent to and ratification of all the obligations of the agreement. Civ.Code § 1589. See, e.g., Union Pacific R.Co. v. Zimmer (1948) 87 Cal.App.2d 524, 197 P.2d 363. Under these circumstances, duress is not an affirmative defense to plaintiff's breach of contract claims.

IV. CONCLUSION

Armstrong has admitted to three separate breaches of the Agreement which require him to pay the Church a combined amount of $150,000 in liquidated damages. In his opposition, he has not provided substantial evidence of any disputed issue of material fact. Plaintiff is, accordingly, entitled to summary adjudication of its Fourth, Sixth, and Eleventh Causes of Action, and it is entitled to entry of judgment on those claims in the amount of $150,000.

Dated: January 20, 1995

Respectfully submitted,

MOXON & BARTILSON

By: _____
Laurie J. Bartilson

Andrew H. Wilson
WILSON, RYAN & CAMPILONGO

Attorneys for Plaintiff
CHURCH OF SCIENTOLOGY
INTERNATIONAL

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Boulevard, Suite 2000, Los Angeles, CA 90028.

On January 20, 1995, I served the foregoing document described as PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION OF THE FOURTH, SIXTH AND ELEVENTH CAUSES OF ACTION OF PLAINTIFF'S SECOND AMENDED COMPLAINT on interested parties in this action,

[ ] by placing the true copies thereof in sealed envelopes as stated on the attached mailing list;

[X] by placing [ ] the original [X] true copies thereof in sealed envelopes addressed as follows:

FORD GREENE
HUB Law Offices
711 Sir Francis Drake Blvd.
San Anselmo, CA 94960-1949

MICHAEL WALTON
700 Larkspur Landing Circle
Suite 120
Larkspur, CA 94939

[x] BY MAIL

[ ] *I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[x] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an

affidavit.

Executed on January 20, 1995 at Los Angeles, California.

[ ] **(BY PERSONAL SERVICE) I delivered such envelopes by hand to the offices of the addressees.

Executed on _____ at Los Angeles, California.

[X] (State) I declare under penalty of the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Laurie J. Bartilson
Print or Type Name

Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)